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No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

WESTERN TURF ASSOCIATION
(a Corporation),
Plaintiff in Error,
vs.
HYMAN GREENBERG,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

WILLIAM G. BURKE,
Attorney for Defendant in Error.

Pernau Publishing Co., S. F.

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In this case we desire to direct the Court's attention to a point inadvertently omitted from the brief filed on behalf of defendant in error, due to the fact that defendant in error's copy of the record in this case was destroyed in the recent conflagration in San Francisco, and no copy thereof was procured by him until after the preparation of his brief had been practically completed.

The writ of error in this case should be dismissed, because the record fails to show that any claim was ever made that a Federal question was involved, or that the statute, upon which this action was commenced, violated any provision of the Federal Constitution.

Upon the trial in the Superior Court, plaintiff in error requested the Court to give to the jury the following instruction, viz: "I instruct you that "the Act of the Legislature of California of the "year 1893, which has been referred to, is uncon- "stitutional and void." (Record, page 29, folio 62.)

The Court will observe that nothing is stated in this requested instruction that the Act in question violated any of the provisions of the Federal Constitution.

The natural import of the language used and the inference to be drawn therefrom is that it violated some provision of the Constitution of the State of California, and nowhere in the pleadings, or in any other part of the record (exclusive of the opinion rendered by the Supreme Court, which this Court will not examine for the purpose of determining whether a Federal question is involved) is there any claim made that the statute in question violates either the provisions of the Constitution of the State of California, or those of the Federal Constitution, or that any Federal question was involved in the determination of the controversy.

For these reasons, it is contended on behalf of the defendant in error that the writ of error issued to this Court should be dismissed.

In support of the contention of defendant in error, the case of

Otis v. Oregon Steamship Co., 115 U. S. 548,

is directly in point. In that case this Court, in dismissing the appeal, said:

> "Neither in the pleadings nor in the evidence nor in the findings nor in the exceptions as shown by the record was there any title, right, privilege or immunity specially set up or claimed under the Constitution or a law or authority of the United States. The sole issue in the case was as to the agency of Otis. The Steamship Company alleged that he made the contract as its agent; and this he denied. There was no suggestion of the illegality of such an agency. The only dispute was as to the fact of its existence." (Citing *Moore v. Miss.*, 21 Wall 639.)

In this latter case, in which the same question was considered by this Court, in dismissing the writ of error, Mr. Chief Justice Waite, speaking for the Court, said:

> "We are not required to re-examine the judgment of a State Court simply because a Federal question may have been decided. To give us jurisdiction, it must appear that such a question 'was necessarily involved in the decision.' (Citing Armstrong v. Treas., 16 Pet. 282.) The old rule, established by early cases, restricted our inquiries as to the existence and decision of the question 'to the face of the rec-

ord.' Previous to the Act of 1867, R. S., Sec. 709, it was uniformly held, except as to the State of Louisiana, where a peculiar practice prevails, that we would not look into the opinions of the Courts to ascertain what had been decided. (Citing many cases.) Since that Act, however, in Murdock v. Memphis (ante 429), we intimated that we might, under some circumstances, examine those opinions, when properly authenticated, as far as might be useful, for the purpose of ascertaining that fact, but at the same time were careful to say that, 'After all, the record of the case, its pleadings, bills of exceptions, judgments, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of inquiry; and while we are not prepared to fix any absolute limit to the sources of inquiry, under the new Act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation.' We are not now called upon to fix this limit. It is sufficient for all the purposes of this case to hold as we do, that if the record shows upon its face that a Federal question was not necessarily involved, and does not show that one was raised, we will not go outside of it, to the opinion or elsewhere, to ascertain whether one was in fact decided."

For these reasons, it is respectfully submitted that the writ of error should be dismissed.

Dated, Jan. 22nd, 1906.

WM. G. BURKE,
Attorney for Defendant in Error.